90-1536

Supreme Court, U.S.
FILED
MAR 19 1991
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

WARDEN JAMES RAY, et al.,
Petitioners

v.

ROBERT LEE BUTLER, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

HARRY A. LYLES
General Counsel
COUNSEL OF RECORD FOR PETITIONERS

STATE OF ALABAMA
DEPARTMENT OF CORRECTIONS
Legal Division
50 North Ripley Street
Montgomery, Alabama
(205) 242-9361

DAVID B. BYRNE, JR.
ROBISON & BELSER
210 Commerce Street
P. O. Drawer 1470
Montgomery, Alabama
(205) 834-7000

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF FEDERAL COURTS HAVE THE INHERENT AUTHORITY TO APPOINT COUNSEL AS OPPOSED TO AN APPOINTMENT UNDER SECTION 1915(d).

II. WHETHER A FEDERAL COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. SECTION 2071.

III. WHETHER A PRO SE LITIGANT IS ENTITLED TO MORE THAN ONE COURT APPOINTED ATTORNEY.

IV. WHETHER A WRIT OF MANDAMUS WAS IMPROPERLY ISSUED WHEN THERE WAS NO USURPATION OF POWER NOR ABUSE OF DISCRETION.

PARTIES

Hon. Robert E. Varner	United States District Judge
Hon. Richard Cohen	Counsel For Plaintiffs/Respondents
Hon. Abigail P. van Alstyne	Counsel For Plaintiffs/Respondents
Hon. David Schoen	Counsel For Plaintiffs/Respondents
Hon. Harry A. Lyles	Counsel For Defendents/Petitioners
Hon. Alice A. Boswell	Counsel For Defendents/Petitioners
Hon. David B. Byrne, Jr.	Counsel For Defendents/Petitioners
Robert Lee Butler	Plaintiff/Respondent
Gordon Vaughn	Plaintiff/Respondent
Andy Wayne Daughtry	Plaintiff/Respondent
Vincin Davis	Plaintiff/Respondent
Lionel Green	Plaintiff/Respondent
Glennon Hoppins	Plaintiff/Respondent
Lord Divine Allah	Plaintiff/Respondent
Guy Hunt	Defendant/Petitioner
Morris Thigpen	Defendant/Petitioner
Robin Swift	Defendant/Petitioner
E. L. Harrelson	Defendant/Petitioner
James Ray	Defendant/Petitioner

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CASES v

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL STATUTES AND RULES 2

STATEMENT OF THE CASE

THE FACTS 3

PROCEEDINGS BELOW 4

REASONS FOR GRANTING THE WRIT 5

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF THE FEDERAL COURT HAS THE INHERENT AUTHORITY TO APPOINT COUNSEL 5

II. A FEDERAL COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. SECTION 2071 7

III. A PRO SE LITIGANT IS NOT ENTITLED TO MORE THAN ONE COURT APPOINTED ATTORNEY 8

IV. THE WRIT OF MANDAMUS WAS IMPROPERLY ISSUED WHEN THERE WAS NO USURPATION OF POWER NOR ABUSE OF DISCRETION 9

CONCLUSION 12

CERTIFICATE OF SERVICE 13

ELEVENTH CIRCUIT OPINION ..... Appendix A

DISTRICT COURT OPINION ..... Appendix B

SUPPLEMENTAL APPENDIX ... WRIT OF MANDAMUS

TABLE OF CASES

CASES — PAGE

Banker's Life and Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953) 10

Barnard v. Thorstenn, 489 U.S. ___ 109 S.Ct. 1294, 103 L.Ed.2d 559 (1989) 6

Cooke v. United States, 267 U.S. 517 (1925) 7

Eisenburg v. United States District Court for the Southern District of Illinois, 910 F.2d 374 (7th Cir., 1990) 11

Ex parte Peterson, 253 U.S. 300, (1920) 7

Franquez v. United States, 604 F.2d 1239, (9th Cir., 1979) 8

Frazier v. Heebe, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) 6

FTC v. Superior Court Trial Lawyers Association, ___ U.S. ___, 110 S.Ct. 768 (1990) 5, 6

Helvering v. Gowran, 302 U.S. 238, (1937) 8

In re Synder, 472 U.S. 634, (1985) 6

Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976) 10

Levine v. United States, 362 U.S. 610 (1960) 7

Link v. Wabash R.R. Co., 370 U.S. 626 (1962) 7

Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) 5, 10

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 6

Roadway Express, Inc. v. Piper, 447 U.S. 752, (1980) 6, 7

Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 8

Strickland v. Washington, 466 U.S. 448 (1984) 8

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) 6

Will v. United States, 389 U.S. 90, 88 S.Ct. 269 (1967) 10

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

WARDEN JAMES RAY, et al.,

Petitioners,

v.

ROBERT LEE BUTLER, et al.,

Respondents.

PETITION FOR WRITE OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

The petitioners respectfully pray that a writ of certiorari issue to review the granting of mandamus that the Eleventh Circuit Court of Appeals has issued to the Honorable Robert Varner, United States District for the Middle District of Alabama.

OPINIONS BELOW

1. The granting of the writ of mandamus by the Eleventh Circuit is attached hereto as Appendix A to this petition. The District Court Opinion is attached hereto as Appendix B. The Writ of Mandamus is attached as the Supplemental Appendix.

JURISDICTION

The issuance of the writ of mandamus by the Eleventh Circuit was granted on December 19, 1990. This Court has jurisdiction under 28 U.S.C. Section 1254.

FEDERAL STATUTES AND RULES

28 U.S.C. Section 2071.
28 U.S.C. Section 1915(d).
Federal Rules of Civil Procedure 83.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES.

The Respondents have filed a lawsuit requesting that a class of inmates be certified. This lawsuit attacks the conditions of confinement at the Kilby Correctional Facility's Segregation Unit in Mt. Meigs, Alabama. The Middle District of Alabama has not yet certified the class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Over two years prior to the filing of the proposed class action, several cases were consolidated which attack the alleged unconstitutional conditions at the Kilby Segregation Unit.

On November 28, 1989, the Honorable Charles S. Coody, United States Magistrate for the Middle District of Alabama, appointed both Richard Cohen and David Schoen to represent the Plaintiff in *Lionel Green v. Dept. of Corrections*, Civil Action No. 88-D-1101-N. This lawsuit also attacked the conditions of confinement at Kilby's Segregation Unit. It is important to note that the order appointing them was not entered under the authority of 28 U.S.C. Section 1915(d). Thereafter, Abigail P. van Alstyne was employed by Southern Poverty Law Center specifically to work on this case. The Respondents' attorneys asked for consolidation of *Lionel Green*, with the *Butler* case, and filed an amended complaint requesting class certification. At this time, Mr. Schoen also represented Glennon Hoppins, an indigent inmate, who had filed several lawsuits attacking many of the same conditions of confinement which the class action lawsuit addressed.

On September 14, 1990, the Honorable Robert E. Varner, United States District Judge for the Middle District of Alabama, issued the order which is the subject of this petition for writ of certiorari. (Appendix B) In that order, Judge Varner relieved David Schoen and Richard Cohen of their

court appointment. Judge Varner appointed Abigail P. van Alstyne to represent the Plaintiffs in the consolidated cases as well as the Plaintiff class if and when such a class was certified. Likewise, this appointment was not made pursuant to 28 U.S.C. Section 1915(d). The order of the court specifically stated that the court had no objection if Mr. Schoen and Mr. Cohen wished to continue to help Ms. van Alstyne. The court set forth that there was only going to be one court appointed attorney. The court further stated that if Mr. Schoen and Mr. Cohen wished to withdraw from the case, they should file a motion for leave to withdraw.[1]

B. PROCEEDINGS BELOW

The Respondents filed their second amended complaint on April 13, 1990 requesting class certification and naming as Defendants the following: Guy Hunt, Governor of the State of Alabama; Morris Thigpen, Commissioner of the Alabama Department of Corrections; Robin Swift, Director of Finance for the State of Alabama; E. L. Harrelson, Warden of Kilby Correctional Facility; and James Ray, Deputy Warden of Kilby Correctional Facility.

The Petitioners filed their answer on May 31, 1990.

Judge Robert E. Varner issued the order sub judice on September 14, 1990. The Respondents thereafter, filed a motion for reconsideration on September 28, 1990, which was denied on October 4, 1990.

On October 15, 1990, the Respondents filed a petition for writ of mandamus to the Eleventh Circuit Court of Appeals.

The Petitioners filed their response to the petition for writ of mandamus on December 7, 1990.

On December 19, 1990 the Eleventh Circuit directed that a writ of mandamus be issued to the Honorable Robert E.

[1] Richard Cohen and David Schoen filed a notice to withdraw as counsel for Lionel Green on March 4, 1991.

Varner, United States District of Alabama. This writ directed Judge Varner to vacate the portion of his order relieving Richard Cohen and David Schoen as attorneys for the proposed Plaintiff class. The writ further directed that Judge Varner vacate his order appointing Abigail P. van Alstyne to represent Glennon Hoppins.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF FEDERAL COURTS POSSESS THE INHERENT AUTHORITY TO APPOINT AND REQUIRE COUNSEL TO SERVE.

In the Eleventh Circuit Court of Appeals opinion directing that a writ of mandamus be issued to Judge Robert E. Varner, United States District Judge for the Middle District of Alabama, the Court relied on *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). The Eleventh Circuit correctly noted that after *Mallard, supra*, a court may not use 28 U.S.C. Section 1915(d) to force an attorney to represent an indigent plaintiff if the attorney objects. However, the attorney in this case, Ms. Abigail P. van Alstyne, was not appointed under 28 U.S.C. Section 1915(d). Ms. van Alstyne was appointed to represent an indigent plaintiff pursuant to the inherent authority which the Federal Courts possess. In *Mallard, supra*, the court specifically appointed the attorney in that case under Section 1915(d). Such is not the case here. This case presents the issue left open in *Mallard:* whether federal courts have the inherent power to require lawyers to serve.

In *FTC v. Superior Court Trial Lawyers Association*, ___ U.S. ___, 110 S.Ct. 768 (1990), Justice Blackmun in his dissent noted:

> "Attorneys are not merely participants in a competitive market for legal services; they are officers of the

> court. Their duty to serve the public by representing indigent defendants is not only a matter of conscience, but is also enforcible by the government's power to order such representation, either as a condition of practicing law in the district, or on pain of contempt."

FTC v. Superior Court Trial Lawyers Association, at 791.

It is well recognized that Federal Courts have the inherent authority to regulate its bar. *Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). (District Court has discretion to adopt local rules that are necessary to carry out the conduct of its business.) *See, In re Synder*, 472 U.S. 634, 643 (1985).

In *Barnard v. Thorstenn*, 489 U.S. ____ 109 S.Ct. 1294, 103 L.Ed.2d 559(1989) this Honorable Court, in determining that a Virgin Island residency requirement was invalid, stated:

> "... if handling indigent criminal cases is a requirement of admission to the Bar, a non-resident knows that he must appear himself or arrange with a resident lawyer to handle the case when he is unavailable."

at 1302.

This Court has also recognized that bar members ". . . could be required to represent indigents and perhaps to participate in formal legal-aid work." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 105 S.Ct. 1272, 1280, 84 L.Ed.2d 205 (1985). An attorney, admitted to the bar, becomes an officer of the Court and is ". . . bound to render services when required by such appointment." *Powell v. Alabama*, 287 U.S. 45, 73, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932).

It is undisputed that Federal Courts possess inherent authority. Federal Courts have the power to appoint masters and experts as well as the power to sanction. See, *Roadway*

Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Ex parte Peterson*, 253 U.S. 300, 313 (1920).

Additionally, this Court has recognized that Federal Courts have inherent contempt powers. *Levine v. United States*, 362 U.S. 610 (1960) (criminal contempt powers are an inherent aspect of federal courts); *Cooke v. United States*, 267 U.S. 517, 539 (1925) (contempt power is essential in the administration of justice).

It is clear that this Court recognizes the importance of allowing Federal Courts to regulate their own bars. This power is fundamental and the appointment of Ms. van Alstyne should be upheld. Judge Varner's order appointing counsel (Ms. van Alstyne) clearly was not an abuse of discretion of an Article III Court's inherent powers. The Constitution does not require federal courts to engage in the "featherbedding" of appointed counsel.

II. A FEDERAL COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. SECTION 2071.

28 U.S.C. Section 2071 (1982) provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Rule 83 of the Federal Rules of Civil Procedure provides in pertinent part:

> "[i]n all cases not provided for by rule, the district judges and magistrate may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

Therefore, a Federal Court may regulate the proceedings before it if done so in a manner consistent with the Federal

Rules or statutes. *Franquez v. United States*, 604 F.2d 1239, 1244-45 (9th Cir., 1979) (jury trial was granted when a federal statute did not provide for such).

Clearly, Judge Robert Varner had the authority to appoint Abigail P. van Alstyne to represent an indigent litigant. Not only does inherent authority exist which empowers a Federal District Judge to appoint counsel, but under Rule 83 of the F.R.C.P. and U.S.C. Section 2071 the Court has the express authority. If Judge Varner had the power by any authority to appoint Ms. van Alstyne, his Order should be upheld even if wrong grounds were relied upon. See, *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943). The District Court was within its authority in appointing Ms. van Alstyne.

III. A PRO SE LITIGANT IS NOT ENTITLED MORE THAN ONE COURT APPOINTED ATTORNEY.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Honorable Court held that the Sixth Amendment right to counsel requires only that a defendant be provided "reasonably effective assistance." *Strickland, supra*, at 687. Plaintiffs do not have a "right" to have more than one court appointed attorney. The attorney appointed by Judge Varner, Ms. Abigail P. van Alstyne, clearly provides the reasonably effective assistance required in *Strickland*. Ms. van Alstyne was handling the majority of the day to day preparation of the case. Furthermore, Ms. van Alstyne was law clerk to the Honorable John Carroll, United States Magistrate for the Middle District of Alabama for two years handling 42 U.S.C. Section 1983 cases. In fact, Ms. van Alstyne was specifically employed by Southern Poverty Law Center to handle this "prison condition case."

Having three lawyers representing the inmates in this case obviously would result in an extreme amount of overlapping of work and duplication of expenses. Having just one appointed attorney would place a reasonable limit on the

amount of attorneys fees, if in fact, the plaintiffs were to prevail. In appointing one attorney, Judge Varner was not attempting to limit *reasonable* attorneys fees, but only those which would necessarily overlap and result in duplicative billing. Given that in less than nine months, $8,000.00 in expenses had already been incurred and 1600 attorney hours and 800 paralegal hours had been generated, there was an apparent need for some control to be exercised over the attorneys fees in this case. Judge Varner's attempt to reasonably contain attorneys fees in this case at the "front end," is clearly desirable, especially in light of the fact that such expenditure would further deplete the limited resources of the Department of Corrections if the inmates were to prevail. The Court's actions were clearly designed to promote the efficient resolution of these cases. The appointment of one lawyer to this case is clearly within the discretion of Judge Robert E. Varner. A civil litigant clearly is not entitled to more representation than a criminal Defendant whose very liberty is at stake.

Certiorari should be granted since the Eleventh Circuit Court of Appeals found that Judge Varner could not appoint Ms. van Alstyne under 28 U.S.C. 1915(d), when in fact Ms. van Alstyne was appointed under the inherent authority that the Federal Courts possess. This appointment is also permissible under F.R.C.P. 83 and 28 U.S.C. Section 2072.

A Federal judge has the authority to limit an appointment in a civil case to one attorney. A review of such is not a proper use of the writ of mandamus.

IV. THE WRIT OF MANDAMUS WAS IMPROPERLY ISSUED WHEN THERE WAS NO USURPATION OF POWER NOR ABUSE OF DISCRETION.

The Writ of Mandamus is an extraordinary remedy. Mandamus should only issue when exceptional circumstances exist which amount to a judicial "usurpation of power." To

ensure that such a writ will only issue under extraordinary circumstances, this Court has set forth certain conditions which must be met in order for the writ to be granted. The party seeking Mandamus must clearly show that there are no other adequate means to obtain the relief desired and that the Petition must show that such issuance is "clear and indisputable" to the extent of "abuse of discretion." *Kerr v. United States Court for the Northern District of California*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269 (1967).

This Court has also observed that a Writ of Mandamus is an extraordinary remedy as they ". . . have the unfortunate consequence of making the [District Court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him." *Kerr v. United States District Court for the Northern District of California, supra*, 426 U.S. at 402, 96 S.Ct. at 2124. This Court further stressed that piecemeal litigation should be discouraged in the interest of fair and prompt administration of justice. Granting such a writ without extraordinary circumstances existing would defeat this highly desirable goal.

The Respondents have failed to meet their burden of showing that they lack other means to obtain relief and have failed to show that there was a "clear abuse of discretion" such as to amount to a "usurpation of [the judicial] power." *Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1814, 1822 (1985), citing *Banker's Life and Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953). This Court in *Mallard* held that mandamus was proper as no alternative remedies existed and that: ". . . the principal reasons for our reluctance to condone use of the writ--the undesirability of making a district court judge a litigant, and the inefficiency of piecemeal appellant litigation—are not present here" (cites omitted).

The Respondents bear the burden of showing they lack

other means to obtain relief. Mandamus should never be used as a substitute for appeal. The Respondents failed to ask for certification of any controlling question of law for an immediate appeal under 28 U.S.C. 1292(b). See, *Eisenberg v. United States District Court for the Southern District of Illinois*, 910 F.2d 374 (7th Cir., 1990). They chose instead to circumvent their remedies and ask for the extraordinary writ of mandamus. The Respondents should not be allowed to willfully bypass their available options and opt for a writ of mandamus.

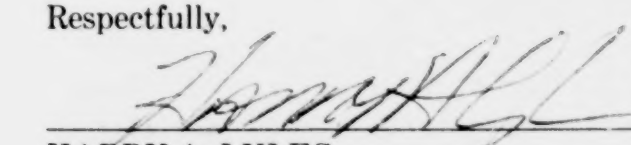
This case is easily distinguishable from *Mallard* in that Judge Varner has been forced into the role of litigant by the Respondents. Furthermore, the Respondents failed to show they lacked other means of obtaining the action sought. As such, the granting of the writ of mandamus by the Eleventh Circuit was improper.

Finally this case presents the clear and discrete issue left unanswered in *Mallard:* Whether Federal Courts have the inherent power to require lawyers to serve. The Petitioners respectfully suggest certiorari should be granted and the question answered in the affirmative.

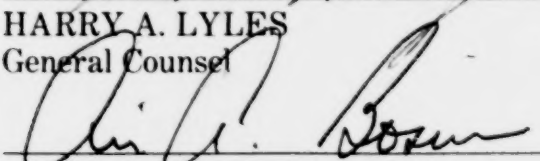
CONCLUSION

For the reasons stated, this Court should grant certiorari to decide the important Federal questions presented in this case.

Respectfully,



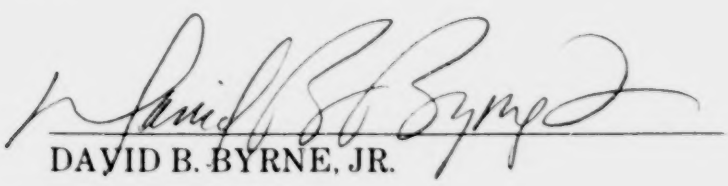
HARRY A. LYLES
General Counsel



ALICE A. BOSWELL
Assistant General Counsel

ADDRESS OF COUNSEL:

Alabama Department of Corrections
Legal Division
Gordon Persons Building
50 North Ripley Street
Montgomery, Alabama 36130
(205) 242-9360



DAVID B. BYRNE, JR.

ADDRESS:

ROBISON & BELSER
210 Commerce Street
P. O. Drawer 1470
Montgomery, Alabama 36102
(205) 834-7000

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

We, Harry A. Lyles, Alice A. Boswell, and David B. Byrne, Jr., do hereby certify that on this 4th day of April, 1991 we did serve three copies of this petition and appendix on Respondents by placing same in the United States Mail, first class, postage prepaid and properly addressed to counsel of record for Respondents as follows:

Hon. J. Richard Cohen
Hon. Abigail P. van Alstyne
Southern Poverty Law Center
P. O. Box 2087
Montgomery, Alabama 36102-2087

Hon. David Schoen
2800 Zelda Road
Suite 100-6
Montgomery, Alabama 36106

We further certify that we have served all parties required to be served.

HARRY A. LYLES
General Counsel

ALICE A. BOSWELL
Assistant General Counsel

DAVID B. BYRNE, JR.
Counsel

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-7837

IN RE:

LORD DIVINE ALLAH,
VINCIN DAVIS,
ANDY DAUGHTRY,
GORDON VAUGHAN, and
LIONEL GREEN,

Petitioners.

On Petition for Writ of Mandamus
to the United States District Court
for the Middle District of Alabama

(December 18, 1990)

Before TJOFLAT, Chief Judge, JOHNSON, and COX, Circuit Judges.

BY THE COURT:

Petitioners' motion for leave to file a reply to respondents' answer to the petition for writ of mandamus is GRANTED.

Respondents' motion to remand this case to the district court for the purpose of holding an evidentiary hearing is DENIED.

The petition for writ of mandamus is GRANTED in part and DENIED in part. We issue a writ of mandamus to the United States District Court for the Middle District of Alabama, directing The Honorable Robert E. Varner to vacate that portion of his order which removed Richard Cohen and David Schoen as attorneys for the proposed plaintiff class in the consolidated actions *Butler v. Hunt*, No. 87-V-058-N, and *Green v. Hunt*, No. 88-D-1101-N.

We also issue a writ of mandamus directing that Judge Varner vacate that portion of his order appointing attorney Abigail van Alstyne to represent plaintiff Glennon Hoppins. After the Supreme Court's decision in *Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, 109 S.Ct. 1814 (1989), a court may not use 28 U.S.C. § 1915(d) to force an attorney to represent an indigent plaintiff if the attorney objects. Ms. van Alstyne asserts that she does not wish to represent Mr. Hoppins for ethical and professional reasons. She has attempted to withdraw as Mr. Hoppins' attorney, through her motion for reconsideration of the district court's order, and the district court has denied her motion. Ms. van Alstyne has shown that she "lack[s] adequate alternative means to obtain the relief [she] seek[s]," *id.* at ___, 109 S.Ct. at 1822; the extraordinary remedy of a writ of mandamus is therefore justified.

We decline to issue a writ of mandamus directing that Judge Varner vacate that portion of his order which assertedly consolidated the cases in question. We do so without resolving the conflict between the parties as whether this order actually consolidated the cases. We note instead that a district court's order consolidating cases for trial is not a proper subject for mandamus relief absent a clear abuse of discretion, see *Pet Milk Co. v. Ritter*, 323 F.2d 586, 588 (10th Cir. 1963) (per curiam).

IT IS SO ORDERED.

APPENDIX B

IN THE UNITED STATES COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

LORD DIVINE ALLAH,
ROBERT LEE BUTLER,
GLENNON HOPPINS,
LIONEL M. GREEN, ETC.

Plaintiffs,

v.

E. L. HARRELSON,

Defendants.

CIVIL ACTION NO. 86V-793-N
CIVIL ACTION NO. 87V-058-N
CIVIL ACTION NO. 87V-780-N
CIVIL ACTION NO. 87V-864-N
CIVIL ACTION NO. 88V-005-N
CIVIL ACTION NO. 88V-1101-N

ORDER

Upon consideration of the files and records in the above-styled cases, this Court is entering this Order in an effort to clarify certain matters, as well as to set specific dates regarding discovery, trial, etc. Therefore, it is ORDERED by this Court:

1. That all of the above-styled cases are hereby consolidated as provided by Rule 42(a), Federal Rules of Civil Procedure.

2. That the Hon. Abigail P. van Alstyne is hereby appointed to represent the Plaintiffs in said cases, as well as the Plaintiff Class if and when such a class is certified by this Court. [1]

3. That the Hon. David Schoen and the Hon. J. Richard Cohen are hereby relieved of their previous appointments as Plaintiffs' counsel in Civil Action No. 87V-780-N and 88V-1101-N.[1]

4. That, effective with the date of this Order, the parties are to file all future pleadings, motions, etc., regarding these consolidated cases in Civil Action No. 87V-58-N, presently styled *Robert Lee Butler v. Warden James Ray, et al*, and the Clerk's Office is DIRECTED to mark the Court's docket sheets accordintly.

5. That, on or before October 15, 1990, Plaintiffs file with this Court a Comprehensive Amended Complaint setting forth Plaintiffs' specific claims in these cases. Said Comprehensive Amended Complaint will replace **all** prior complaints, amended complaints, and any amendments thereto filed in the above-styled cases.

---

[1] In reviewing the files in these cases, this Court noticed that two attorneys (Messrs. David Schoen and J. Richard Cohen) had been appointed by the Court to represent the Plaintiff, Lionel M. Green, in Civil Action No. 88V-1101-N [see Order dated November 28, 1989]; that Attorneys J. Richard Cohen, Abigail P. van Alstyne, and David Schoen had made an appearance on behalf of Robert Lee Butler in Civil Action No. 87V-58-N [see Notice of Appearance filed January 19, 1990]; that the Hon. David Schoen had been appointed to represent Plaintiff, Glennon Hoppins, in Civil Action No. 87V-780-N [see Order dated September 30, 1987]; and that no attorney had been appointed to represent Plaintiffs in Civil Actions No. 86V-793-N, 87V-864-N, and 88V-5-N. The purpose of Paragraphs 2 and 3 of this Order is to clarify for the record that there will be only one court-appointed attorney in these cases. If the other attorneys want to continue to help the Plaintiffs' court-appointed attorney, the Court has no objection. However, if said attorneys wish to withdraw from the cases and let court-appointed counsel continue alone, they may file a motion for leave to withdraw with the Court.

6. That, on or before November 5, 1990, the Defendants file their Answer to said Comprehensive Amended Complaint.

7. That all discovery in these cases be completed on or before January 11, 1991.,

8. That the trial of these cases is hereby scheduled for March 11, 1991, at 9:00 a.m., in Montgomery, Alabama.

9. That the jury for trial of these cases will be selected on February 25, 1991, at 10:00 a.m., in Montgomery, Alabama.

DONE this 14th day of September, 1990.

R. E. VARNER
UNITED STATES DISTRICT JUDGE

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

IN RE:

LORD DIVINE ALLAH,
VINCIN DAVIS,
ANDY DAUGHTRY,
GORDON VAUGHAN, and
LIONEL GREEN,

Petitioners.

WRIT OF MANDAMUS

To the HONORABLE ROBERT E. VARNER, Senior Judge of the United States District Court for the Middle District of Alabama.

Whereas the United States Court of Appeals for the Eleventh Circuit rendered its decision on December 18, 1990 granting in part and denying in part a petition for writ of mandamus; NOW THEREFORE you are commanded to vacate that portion of your order which removed Richard Cohen and Davis Schoen as attorneys for the proposed plaintiff class in the consolidated actions *Butler v. Hunt*, No. 87-V-058-N, and *Green v. Hunt*, No. 88-D-1101-N and that portion of your order which appointed attorney Abigail van Alstyne to represent plaintiff Glennon Hoppins, all in conformity with this court's opinion of December 18, 1990. Done this 19th day of December, 1990.

A True Copy - Attested
Clerk, U.S. Court of Appeals,
Eleventh Circuit

By: Nancy Halbrook
Deputy Clerk
Atlanta, Georgia

MIGUEL J. CORTEZ, Clerk
United States Court of
Appeals for the
Eleventh Circuit

Miguel J. Cortez